IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

WP(Crl.).No. 253 OF 2007(S)

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PETITIONER:

SHAHINA, D/O. SHAHUL HAMEED,
SHAHINA MANZIL, VENGARA MURI, KALLELIBHAGAM P.O.,
KARUNAGAPPALLY.

BY ADV. SRI.BECHU KURIAN THOMAS
SRI.ROSHEN.D.ALEXANDER

RESPONDENTS:

1. THE DISTRICT SUPERINTENDENT OF POLICE,
KOLLAM.

2. CIRCLE INSPECTOR OF POLICE,
KARUNAGAPPALLY.

3. SUB INSPECTOR OF POLICE,
KARUNAGAPPALLY.

4. LAILA BEEVI, W/O. LATE YUNUS KUNJU,
PEEDIKAPADEETTATHIL, KALLELIBHAGAM MURI,
KALLELIBHAGAM VILLAGE.

5. ABDUL MANAF, S/O. YUNUS KUNJU,
PEEDIKAPADEETTATHIL, KALLELIBHAGAM MURI,
KALLELIBHAGAM VILLAGE.

6. ABDUL RASHEED, S/O. YUNUS KUNJU,
PEEDIKAPADEETTATHIL, KALLELIBHAGAM MURI,
KALLELIBHAGAM VILLAGE.

ADDITIONAL RESPONDENT NO: 7:

ABDUL KARIM, S/O. YUNUS KUNJU,
PEEDIKAPADEETTATHIL,
KALLELIBHAGAM VILLAGE,
KALLELIBHAGOM MURI,
KALLELIBHAGAMP.O.,
KARUNAGAPPALLY, KOLLAM DISTRICT.

BY ADV. SRI.B.MOHANLAL
GOVT. PLEADER SRI. C.M. KAMMAPPU.

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**W.P.(CRL.) 253/2007**

## APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE COMPLAINT DATED 13.8.2007 FILLED BY THE PETITIONER BEFORE THE DY. S.P.., KARUNAGAPPALLY.

EXT.P2 TRUE COPY OF TE COMPLAINT FILED BY THE PETITIONER BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KARUNAGAPPALLY IN M.C. 77/07.

EXT.P2(a) TRUE COPY OF THE BIRTH CERTIFICATE OF PETITIONER'S CHILD AFSAL DATED 15.6.2007.

EXT.P3 TRUE COPY OF THE ORDER DATED 11.10.2007 IN M.C. 77/07 ON THE FILES OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KARUNAGAPPALLY.

EXT.P4 TRUE COPY OF THE NEWS PAPER REPORT APPEARED IN VEEKSHANAM DAILY DATED 26.10.2007.

EXT.P4(a) TRUE COPY OF THE NEWS PAPER REPORT APPEARED IN DESHABHIMANI DAILY DATED 26.10.2007.

**RESPONDENTS' EXHIBITS:**

EXT.R7(a) THE TRUE COPY OF THE AGREEMENT DATED 4.7.2007 EXECUTED BY THE 7TH RESPONDENT AND THE PETITIONER.

EXT.R7(b) THE TRUE COPY OF THE THALAKNAMA DATED 7.7.2007.

EXT.R7(c) THE TRUE COPY OF THE CERTIFICATE ISSUED FROM THE VADAKKUMTHALA MUSLIM JAMA ATH DATED 13.8.2007.

EXT.R7(d) THE TRUE COPY OF THE CONSENT LETTER EXECUTED BY THE PETITIONER AND HIS FATHER DATED 5.6.2007.

EXT.R7(e) THE TRUE COPY OF THE ORDER ISSUED BY THE HON'BLE S.C. KO,,AM, DATED 5.11.2007.

// TRUE COPY //

P.S. TO JUDGE.

KNC/-

P.R. RAMAN & V. K. MOHANAN, JJ.

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W.P.(CRL) NO. 253 OF 2007

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DATED THIS, THE 29TH DAY OF NOVEMBER, 2007.

J U D G M E N T

Raman, J.

Shahina, the petitioner herein seeks for a direction to produce before this Court, her son Master Afsal aged two years, who is stated to be under the illegal custody of Respondents 4 to 6. Petitioner avers that she and the son of the 4th respondent (who is impleaded as the 7th respondent in this writ petition) were husband and wife and in that wedlock Afsal was born on 17.4.2005. Petitioner filed a complaint before the Judicial Magistrate of First Class, Karunagappally as M.C. 77/2007 under the provisions of Protection of Women from Domestic Violence Act, 2005 and by order Ext.P3 dated 11.10.2003 that court directed the custody of the child to be granted to the petitioner and also directed the police to render sufficient assistance. It is the contention of the petitioner that in spite of the order Ext.P3, the child was not handed over to her. According to her, the father of the child left to Dubai and the child is being looked after by his grandmother. But subsequently, on a turn of event, it is brought to our

notice by the learned counsel for the respondents that an appeal has been preferred against the order Ext.P3 and the appellate court has stayed the same.

2. In the counter affidavit filed by the Additional 7th respondent it is averred that the marriage between himself and the petitioner was dissolved and it was agreed at that time that the child would continue to be in his custody. Ext.R7(a) is produced which is stated to be an agreement in this regard.

3. In the reply affidavit filed by the petitioner, however, it is alleged that the said agreement has no legal backing and that the same was executed under threat and coercion.

4. We had passed interim orders asking the child to be produced and also gave opportunity to the petitioner to have the custody of the child for two hours. Today also, such opportunity was given to the petitioner. The question as to whether Ext.R7(a) is valid or not is a matter on which this Court cannot ultimately pronounce since the matter has to be decided based on evidence to be tendered by the parties. Further, it is also pointed out by the learned counsel for the Additional 7th respondent that they have already preferred an Original Petition under the Guardian & Wards Act before the

Family Court as O.P. (G & W) 703/2007 and the same is posted to 12.1.2008.

5. Taking note of the previous proceedings between the parties under the provisions of Protection of Women from Domestic Violence Act and the original petition now pending before the Family Court, as referred to above, we find that this is an appropriate case where the parties should be relegated to pursue their remedies already invoked rather than interdicting such proceedings by passing any order by this Court. Though the petitioner has a case that the child is only two years old and she is entitled to have his custody, the ultimate welfare of the child will have to be looked into and decide as to who should be entitled to have the custody of the child. Since the matter is pending before the Family Court, we refrain from entering any finding on merits. Untrammeled by the above proceedings, the Family Court shall decide the issue and if either of the party applies for interim custody, it will be open to the Family Court to pass appropriate orders.

6. Though the learned counsel for the petitioner sought for a direction to the Sessions court where the appeal against the order in M.C. 77/2007 is pending, we do not think any direction as such could be issued. However, if an application is made by the petitioner in that behalf, certainly

the court shall consider the same and expedite the proceeding.

The 7th respondent is directed to produce the child before the Family Court on the next posting date ie. on 12.1.2008.

The writ petition is closed with the above observations.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-